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CITY OF SANTA FE, NEW MEXICO

BILL NO. 2022-__

INTRODUCED BY:

Mayor Alan Webber

Councilor Carol Romero-Wirth

AN ORDINANCE

**GRANTING NTS COMMUNICATIONS, LLC, DBA VEXUS FIBER, A NON-EXCLUSIVE
FRANCHISE, TO OPERATE A TELECOMMUNICATIONS NETWORK WITHIN THE
CITY OF SANTA FE; THE RIGHT TO USE CITY PUBLIC RIGHTS-OF-WAY TO
PROVIDE TELECOMMUNICATIONS SERVICES WITHIN THE CITY; AND FIXING
THE TERMS AND CONDITIONS THEREOF.**

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Legislative Findings. The governing body of the city of Santa Fe finds
that:

A. The granting of a franchise to NTS Communications, dba Vexus Fiber. (“the
Company”), is necessary for the access and use of public rights-of-way to provide
telecommunications services within the city limits in accordance with the terms and conditions of
this Ordinance and the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2
SFCC 1987 (“Article 27-2”).

B. The granting of such a franchise permits competitively neutral and

1 non-discriminatory access to the public rights-of-way for providers of telecommunications
2 services; and allows the city to appropriately manage the public rights-of-way in order to
3 minimize the impact and cost to the citizens of the placement of telecommunications facilities
4 within the public rights-of-way.

5 C. The granting of a franchise promotes competition among telecommunications
6 services providers and encourages the universal availability of telecommunications services to
7 residents and businesses of the city through the careful management of public rights-of-way.

8 D. It is the intent of the city in the granting of the franchise to obtain fair and
9 reasonable compensation for the use of public rights-of-way through the collection of fees and
10 charges, and to minimize the congestion, inconvenience, visual impact, and other adverse effects
11 on the public rights-of-way by Company's commercial use of public rights-of-way.

12 E. To the extent permitted by state and federal law, the granting of a franchise
13 allows the city to exercise such other powers, as the city may have to protect the public health,
14 safety, and welfare, ensure the continued quality of telecommunications services, and safeguard
15 the rights of consumers who are residents of the city.

16 F. In accordance with Article 27-2, Company submitted an application for a
17 franchise on October 22, 2021.

18 G. The city is authorized to grant one or more non-exclusive franchises for
19 telecommunications services within the city.

20 H. The city has reviewed Company's application and has determined that granting a
21 franchise in accordance with Article 27-2 is in the public interest and in the interest of the city
22 and its residents.

23 I. This franchise, as it relates to the city's costs, maintenance, management, and
24 necessary regulation of public rights-of-way, will assist in meeting the telecommunications
25 related needs and interests of the community.

1 **Section 2. Franchise Terms.** In exchange for Company’s compliance with the terms
2 of this Ordinance, the provisions of Article 27-2, and other applicable city codes, there is hereby
3 granted by the city to Company permission to use public rights-of-way to provide
4 telecommunications services. All terms of Article 27-2 shall control Company’s use of the public
5 rights-of-way except as specifically set out in this Ordinance.

6 A. **Short Title; Purpose; Applicability.**

7 1. This Ordinance shall be cited as the “Vexus Fiber Franchise Ordinance”.

8 2. The purpose of this Ordinance is to grant Company, the right, privilege,
9 and authority to:

10 (a) Furnish and distribute telecommunications services in the city, by
11 means of its network, on, over, under, along and across public rights-of-way, now or hereafter
12 included in the boundaries of the city as such boundaries now exist or may hereafter be extended;
13 and

14 (b) Construct, purchase, acquire, locate, maintain, and extend into,
15 within, and through the city, a telecommunications network for the period and upon the terms and
16 conditions specified in this franchise comprised of all facilities and equipment used by Company
17 to provide telecommunications services, including but not limited to “Backhaul Equipment” and
18 “Wireless Communication Equipment.”

19 This permission is not exclusive and does not prevent the city from
20 issuing other franchises or authorizations or prevent the city itself from constructing or operating
21 its own telecommunications network within the public rights-of-way, with or without a franchise.

22 3. This franchise applies to the placement of telecommunications facilities in
23 the city’s public rights-of-way.

24 B. Definitions.

25 *Bad Debt* means any portion of a debt that is related to a sale of telecommunications at

1 retail, for which gross charges are not otherwise deductible or excludable, that has become
2 worthless or uncollectible as determined under applicable federal income tax standards.

3 *Department* means the department of public works.

4 *Gross Charge*.

5 1. Includes all revenues derived directly or indirectly by a Provider from or
6 in connection with the Telecommunications Services offered within the City through or by means
7 of a Telecommunications Network within the City, exclusive of any Franchise Fee or tax passed
8 through to consumers on behalf of governmental agencies, received by the Provider for services
9 provided to customers through use of the Network. *Gross Charge* shall include any revenue
10 received by a Provider or any Affiliate through any means that is intended to have the effect of
11 evading the payment of compensation that would otherwise be paid to the City for Franchise
12 Contract granted pursuant to this ordinance.

13 2. *Gross Charge* shall not include (i) proceeds from the sale of bonds,
14 mortgages, or other evidence of indebtedness, securities, or stocks; or (ii) gross receipts taxes, bad
15 debt write-offs, and customer credits; or (iii) revenue of any Affiliate or Provider from long distance
16 service, commercial mobile radio service, cellular, personal communications service, other wireless
17 communications service, or directory advertising. Each of the above are not included in the
18 definition of *Gross Charge* and, therefore, are not included in the calculation of any fee due under
19 a Franchise.

20 3. *Gross Charge* shall be measured and monitored periodically.

21 *Sale of Telecommunications at Retail* means the transmitting, supplying, or furnishing of
22 telecommunications and all services rendered in connection therewith for consideration, other than
23 between a parent corporation and its wholly owned subsidiaries or between wholly owned
24 subsidiaries, but only when the infrastructure maintenance fee imposed by this chapter previously
25 has been paid to a retailer and the gross charge made by one such corporation to another such

1 corporation is not greater than the gross charge paid to the retailer for use or consumption and not
2 for resale.

3 *Service Address* means the location of telecommunications equipment from which
4 telecommunications services are originated or at which telecommunications services are received.
5 If this location is not a defined location, as in the case of wireless telecommunications, paging
6 systems, maritime systems, air-to-ground systems and the like, “service address” shall mean the
7 location of the customer’s primary use of the telecommunications equipment as defined by the
8 location in the City where bills are sent.

9 *Telecommunications.*

10 1. All transmissions between or among points specified by the user of
11 information of the user's choosing (whether voice, video, or data), without change in the form or
12 content of the information as sent and received, where such transmissions are accomplished by
13 means of a Telecommunications Network.

14 2. *Telecommunications* shall not include cable services as defined in Title
15 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USC § 521 et seq.) and
16 shall not include telecommunications services provided and used by a public utility as that term is
17 defined at § 62-3-3(G) NMSA 1978, or successor statute, for (i) its internal system communication
18 needs; and (ii) provided directly or indirectly to its customers, including but not limited to electronic
19 meter reading, load control, demand side management, power quality monitoring, and other
20 activities related to the delivery of electricity or natural gas.

21 *Telecommunications Network* means any System which includes facilities and/or
22 equipment placed in the Public Rights-of-Way and used to provide any Telecommunications
23 Service.

24 *Telecommunications Provider (“Provider”)* means:

25 1. Any Person who provides any Telecommunications Service within the

1 City by means of:

2 (a) a Telecommunications Network owned by such Person or its
3 Affiliate;

4 (b) specifically identifiable facilities of a Telecommunications
5 Network reserved or made available for the use of such Person or its Affiliate under a lease or any
6 other arrangement for a term longer than 120 days; or

7 (c) facilities of a Telecommunications Network not owned by such
8 Person or its Affiliate and not specifically identifiable but obtained from another Person (including
9 another Provider) if the use of such facilities is continuing and substantial. A Person owning or
10 operating telecommunications facilities that merely pass through the City and such Person and
11 facilities do not offer Telecommunications Service to subscribers within the City shall not be
12 subject to this ordinance, provided that Person has received other appropriate authorization from
13 the City to rent or occupy the Public Rights-of-Way.

14 2. Except to the extent that a *Provider* or a Person uses the Public Rights-of-
15 Way, a *Provider* or any Person which provides commercial mobile radio service, cellular, personal
16 communications service, or other wireless communications service shall not be subject to this
17 ordinance with respect to such service.

18 *Telecommunications Service*. The offering of Telecommunications within the City for a
19 fee directly to the public, or to such classes of users as to be effectively available directly to the
20 public.

21 *Trenchless excavation* means any line installation, replacement or rehabilitation through
22 the use of boring, jacking, horizontal drilling or tunneling.

23 *Wireless Telecommunications* includes cellular mobile telephone services, personal
24 wireless services as defined in Section 704(C) of the Telecommunications Act of 1996 (Public Law
25 Number 104-104), as now or hereafter amended, including all commercial mobile radio services

1 and paging services.

2 **C. Infrastructure Maintenance Franchise Fee.**

3 1. Pursuant to the authority granted by section § 3-42-1 NMSA 1978 and 47
4 U.S.C. 253(c), there is hereby imposed an infrastructure maintenance franchise fee upon the
5 Company at the rate of two percent (2%) of all gross charges charged by the Company to a service
6 address in the city for telecommunications originating or received in the city.

7 2. The fee imposed by this chapter shall not be imposed in any circumstances
8 in which the imposition of the fee would violate the Constitution or statutes of the United States.

9 **D. Filing Returns and Payment of Franchise Fee.**

10 1. On or before the last day of each quarter, the Company is required to pay
11 the infrastructure maintenance fee imposed by this chapter and shall file with the City a remittance
12 return and shall pay the fee attributable to gross charges for the preceding calendar month. The
13 return shall contain such information as the director may reasonably require.

14 2. On or before the last day of the fourth quarter of 2022, the Company shall
15 provide to the City a report certified by an independent certified public accountant attesting to the
16 amount of the infrastructure maintenance fees paid to the department for the preceding calendar
17 year, and that such amount complies with the requirements of this chapter.

18 **E. Collection of Additional Charges by Retailers.**

19 1. When the Company makes or effectuates a sale of telecommunications at
20 retail, it shall pay the infrastructure maintenance fee to the department as provided by section C,
21 of this chapter. The fee shall constitute a debt owed by the retailer to the city.

22 2. The retailer may charge each customer an additional charge in an amount
23 equal to the infrastructure maintenance fee attributed to the customer's service address in the city.
24 This additional charge to customers shall, when collected, be stated as a distinct item on the bill
25 to each customer separate and apart from the retailer's gross charges to its customers for

telecommunications.

3. Each retailer may retain 2% of the additional charges it collects under this chapter to reimburse itself for expenses incurred in connection with accounting for and remitting the fee to the department.

F. Registration of Providers and Resellers.

1. Within ninety (90) days after the effective date of the ordinance authorizing a franchise with the Company, the Company shall provide the name and address of every telecommunications reseller or other telecommunications company with whom the Company has a contractual relationship to provide telecommunications services or to make available telecommunications facilities in the public way. The Company shall have a continuing duty to file with the City, within 45 days after the date of occurrence of any changes in the information provided to the City, including the creation or termination of a contractual relationship described herein.

2. *Resales.* Whenever amounts are claimed to be excluded from gross charges as sales for resale, the reseller shall furnish to the Company the reseller's resale information. The Company shall retain the resale information with its books and records.

G. Maintaining Books and Records.

The Company shall keep accurate books and records of its business or activity, including original source documents and books of entry denoting the transactions that gave rise, or may have given rise, to any liability or exemption. All such books and records shall, at all times during business hours of the day, be subject to and available for inspection by the department with twenty-four (24) hour notice.

H. Insurance Requirements. Company shall comply with the provisions of Section 27-2.9 SFCC 1987, and Company shall obtain and maintain in full force and effect throughout the term of this franchise the following types of insurance:

1. Commercial comprehensive general liability insurance; and

1 2. Workers' Compensation insurance as required by law.

2 **I. Term of Franchise.** The term of this franchise, and the rights, privileges, and
3 authority granted hereunder shall continue for a period of ten (10) years from the effective date
4 hereof. The term of this franchise shall automatically be renewed annually unless Company
5 provides notice to City of its intent not to renew at least thirty (30) days prior to expiration of the
6 then current term. Company may surrender permits at any time and remove its
7 telecommunications facilities at any particular location upon thirty (30) days' prior written notice
8 to City. Company shall not be obligated to pay the franchise fee for such location following
9 removal of its telecommunications facilities.

10 **J. Indemnity.** Company and City agree to defend, indemnify, and hold harmless
11 each other and its officials, agents, volunteers, and employees from and against any and all claims,
12 actions, suits, or proceedings of any kind brought against said parties because of any injury or
13 damage received or sustained by any person, persons, or property arising out of or resulting from
14 the activities of the indemnifying party pursuant to this franchise, except to the extent caused by
15 the negligence or willful misconduct of the indemnitee or by reason of any asserted act or omission,
16 neglect, or misconduct of the indemnitee, or its agents or employees, or any subcontractor or its
17 agents or employees. The indemnity required hereunder shall not be limited by reason of the
18 specification of any particular insurance coverage. Neither party shall be liable to the other for
19 consequential, indirect or punitive damages (including lost revenues, loss of service, or loss of data)
20 for any cause of action, whether in contract, tort or otherwise, even if the party was or should have
21 been aware of the possibility of these damages, whether under theory of contract, tort (including
22 negligence), strict liability or otherwise. The maximum liability of either party to the other
23 hereunder shall be the amount paid or payable during the preceding twelve (12) months.

24 **K. Violations and Penalties.** If the Company fails to pay the infrastructure
25 maintenance franchise fee, as provided by this Chapter, the Company shall be subject to a fine of

1 \$100 for each day that the failure to pay continues. Each day that the Company fails to pay shall
2 constitute a separate and distinct violation under this Chapter. Any retailer that becomes subject to
3 this fine may be enjoined from doing business in the City until the Company has paid all sums due
4 under this Chapter.

5 Any telecommunications company who otherwise violates this chapter shall be subject to
6 a fine of \$100 for each offense. Each day the violation continues shall constitute a separate offense.

7 **L. Dispute Resolution Provision.**

8 1. In the event of any other dispute arising from or relating to the franchise
9 or breach thereof, and if the dispute cannot be settled through negotiations, the following process
10 will be followed during which any of the above remedies and penalties may be imposed.

11 2. All disputes will be mediated prior to litigation. The costs of such
12 mediation will be equally split. The place of the mediation session shall be in Santa Fe, New
13 Mexico. The city and the Company will select a mediator or mediators by mutual agreement and,
14 in cooperation with the mediator(s), shall determine all necessary rules and procedures for the
15 mediation. The city and the Company will fully cooperate in the mediation activities. All mediation
16 communications shall be confidential, not subject to disclosure and shall not be used as evidence
17 in any arbitration, judicial, or administrative proceeding, as set forth in the Mediation Procedures
18 Act, NMSA 1978, §§ 44-7b-1 through 44-7b-6.

19 **M. Unauthorized Use of Public Rights-Of-Way Unlawful.** In accordance with
20 Section 27-2.8 SFCC 1987, Company shall not:

21 1. Use public rights-of-way without authorization to provide
22 telecommunications services.

23 2. Place facilities on public structures or public utility infrastructure to
24 provide telecommunications services which are not allowed under the terms of this franchise.

25 Each unauthorized use shall be deemed to be a distinct and separate offense. The provisions of this

1 paragraph do not apply to any dispute between the city and Company under this franchise where
2 the city alleges that Company has failed to comply with the terms of this franchise.

3 **N. Obligations of Providers Regarding the Public Rights of Way.** The Provider
4 shall comply with the provisions of 27-2.8 regarding the public right of way. Before the provider
5 may conduct underground work involving excavation, new construction, or major relocation work
6 in any public rights-of-way, the provider shall first notify the city through the acquisition of a street
7 cut permit as per Section 23-2 SFCC 1987 and shall comply with any special conditions relating to
8 location, scheduling, coordination, and public safety as more particularly described by 27-2.8.

9 **O. Compliance with Law.**

10 1. Company and City shall comply with the terms and conditions of
11 Article 27-2 SFCC 1987 except as set forth herein, all other applicable city ordinances, and
12 federal and state laws.

13 2. Company is explicitly subject to the police powers of the city, all other
14 applicable governmental powers, and the city's rights under state and federal laws.

15 **P. Severability.** The requirements and provisions of this Ordinance and its sections,
16 parts, subparts, paragraphs, and clauses are severable. In the event that any requirement, provision,
17 section, part, subpart, paragraph, or clause of this Ordinance, or the application thereof to any
18 person or circumstance, is held by a court of competent jurisdiction to be invalid or unenforceable,
19 it is the intent of the governing body that the remainder of the Ordinance be enforced to the
20 maximum extent possible consistent with the purposes of this Ordinance.

21 **Q. Effective Date; Publication.** As provided by NMSA 1978, Section 3-42-1, this
22 Ordinance shall not become effective until at least thirty (30) days after its adoption, during which
23 time this Ordinance shall be twice published in full, not less than seven days apart. As required by
24 law, Company shall pay the publication cost.

25 **R. Acceptance.** Company, within thirty (30) days of the date of adoption of this

1 Ordinance, shall file with the city clerk an unconditional acceptance of this Ordinance, on a form
2 prescribed by the city. Within ten (10) days after the filing of the acceptance, the city clerk shall
3 acknowledge in writing the receipt of Company's acceptance. If Company does not file said
4 acceptance this Ordinance shall not be or become effective.

5 **S. Notice.** For the purpose of this Ordinance:

6 1. Notice to the city shall be to:

7 City Manager

8 City of Santa Fe

9 Post Office Box 909

10 Santa Fe, New Mexico 87504-0909

11 With a copy to:

12 City Attorney

13 City of Santa Fe

14 Post Office Box 909

15 Santa Fe, New Mexico 87504-0909

16 2. Notice to Company will be to:

17 Attn.: Keith Davidson, CFO

18 NTS Communications, LLC dba Vexus Fiber

19 912 S. Main Suite 106

20 Sikeston, MO 63801

21 573-481-2265

22 Keith.davidson@vexusfiber.com

23 3. Notice shall be effective upon delivery at the above addresses until the city
24 or Company notifies the other in writing, of a change in address. All notices shall be delivered
25 personally or sent by certified mail, return receipt requested to the parties at their respective

addresses set forth above.

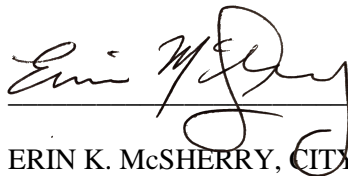
PASSED, APPROVED, and ADOPTED this _____ day of _____, 2022.

ALAN WEBBER, MAYOR

ATTEST:

KRISTINE MIHELICIC, CITY CLERK

APPROVED AS TO FORM:



ERIN K. McSHERRY, CITY ATTORNEY